



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

MARGARET M. O'NEILL BUILDING
410 FEDERAL STREET, SUITE 1
DOVER, DE 19901

VOICE: (302) 739-3620
TTY/TDD: (302) 739-3699
FAX: (302) 739-6704

December 23, 2009

Ms. Susan K. Haberstroh
Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 13 DE Reg. 751 [DOE Proposed FERPA Regulation]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOEs) proposal to readopt its Family Educational Rights and Privacy Act (FERPA) regulation with no changes. The regulation was published as 13 DE Reg. 751 in the December 1, 2009 issue of the Register of Regulations. SCPD commented on the regulation in 2004 and 2005. For background, attached please find a copy of SCPDs December 17, 2004 and March 29, 2005 letters. Council has the following observations on the proposed regulation.

First, in 2004-2005, SCPD noted that the DOE generates educational records in multiple contexts (e.g. ICT minutes; administrative hearing records) and that the DOE should therefore offer a hearing to someone requesting an amendment rather than exempting itself under §3.3. The DOE responded that it was exempt from the FERPA hearing regulation. SCPD continues to question the exemption. For example, the DOE is now a direct provider of services to students in the Department of Correction system. See, e.g., the attached administrative complaint decision in D.D. v. Delaware Department of Education, AC 10-2 (Del. SEA October 5, 2009). If a student in DOC custody wished to pursue amendment of records pursuant to Part C of the FERPA regulation, the request would be submitted to the DOE. Therefore, at a minimum, the exemption in §3.3 is "overbroad". Likewise, the DOE exemption from issuance of annual notice (FERPA §99.7) in §3.2 is overbroad. The DOE should be providing such notice to special education students in DOC custody. Finally, there is some "tension" between the notice exemption and 14 DE Admin Code Part 927, Section 12.0, which recites that the DOE will issue a notice to parents which includes a "description of all of the rights of parents and children regarding ...rights under FERPA and implementing regulations under 34 C.F.R. Part 99."

Second, Section 1.0 recites that it is “intended to govern access to, confidentiality of, and the amendment of educational records in a manner consistent with ...the Individuals with Disabilities Education Act.” However, those standards are actually compiled in 14 DE Admin Code Part 927. At a minimum, the DOE should consider a cross reference. Cf. 13 DE Reg. 753, 756, §5.2 (12/1/09).

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulation.

Sincerely,

A handwritten signature in black ink, reading "Daniese McMullin-Powell" with a circled "E" at the end.

Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Lillian Lowery
Dr. Teri Quinn Gray
Ms. Martha Toomey
Ms. Paula Fontello, Esq.
Ms. Mary Cooke, Esq.
Mr. John Hindman, Esq.
Mr. Charlie Michels
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens